In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	
GEORGE LEON DAY	)	
(Chapter 7 Case 91-40674)	)	
	)	
Debtor	)	
	)	
	)	
	)	
WESTERN TEMPORARY SERVICES, INC.	)	Adversary Proceedings
	)	
	)	Number 91-4083
Plaintiff	)	
	)	*and*
	)	
	)	Number 91-4138
v.	)	
	)	
GEORGE LEON DAY	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

Defendant, George Leon Day ("Debtor"), filed a petition with this court on April 1, 1991, seeking relief under Chapter 7 of the Bankruptcy Code. Plaintiff, Western Temporary Services, Inc. ("Western"), filed a complaint to determine dischargeability of debt on July 2, 1991, against Debtor under 11 U.S.C. Section 523(a)(6) asserting that Debtor misappropriated funds in at least the amount of $17,812.29.

Plaintiff also filed a complaint objecting to the general discharge of the Debtor pursuant to 11 U.S.C. Sections 727(a)(3); (a)(4)(A); and (a)(6)(C). A trial of the above-captioned complaints was consolidated by agreement of counsel and conducted on January 19, 1993. After consideration of the evidence and applicable authorities, this court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Beginning in 1987, the Debtor, George Day, entered into a number of franchise agreements with Plaintiff to operate temporary help franchises in Charlotte, North Carolina, Charleston, South Carolina, and Savannah, Georgia. Some of the franchises were operated under corporate names and at least one operated at its inception in the Debtor's individual name. The entities under which Debtor operated in a corporate capacity are enumerated below in these findings. Plaintiff discovered that over $17,000.00 in customer remittances had been misappropriated by diversion into accounts maintained by the Debtor.

Facts regarding the Section 523 complaint:

1) On or about June 9, 1987, a franchise agreement was entered into between Western Temporary Services and Charleston Temporary Services, Inc., under which Debtor operated a business (light industrial and medical temporary help) in Charleston, South Carolina. By letter dated February 12, 1991, and in accordance with the franchise agreement, Plaintiff notified Debtor that his franchise was terminated. *See* Plaintiff's Exhibit 22.

2) On June 16, 1989, a franchise agreement was entered into between Western

Temporary Services and Geld, Inc., under which Debtor operated a business (clerical temporary help) in Charlotte, North Carolina. By Voluntary Termination Agreement dated January 23, 1990, this franchise with Debtor through Geld, Inc., was terminated effective 12:00 o'clock midnight, January 19, 1991. *See* Plaintiff's Exhibit 23.

3) On June 14, 1989, a franchise agreement was entered into between Western Temporary Services and George L. Day, under which Debtor operated a business (clerical temporary help) in Savannah, Georgia. On May 22, 1989, a franchise agreement was entered into between Western Temporary Services and Gold I under which Debtor operated a business (medical temporary help) in Savannah, Georgia. By Voluntary Termination Agreement dated February 21, 1991, this franchise with Debtor and the one with Debtor through Gold I was terminated effective February 21, 1991. *See* Plaintiff's Exhibit 25.

4) Under each of the franchise agreements between Western and Defendant, or the said corporations which he controlled, Western was to bill and receive all funds from the franchise customers.

5) On or about November 8, 1990, Debtor misappropriated a check from The Saint Francis Xavier Hospital in the amount of $7,167.51 by diverting the check and placing it into the account of The Day Company at First Federal of South Carolina. (*See* Exhibit P-1, Check drawn by The Saint Francis Xavier Hospital, check #418231 dated November 2, 1990, in the amount of $7,167.51 payable to Western Medical Services deposited to account number 096-3147-403.

The testimony of Nancy Dunn, Director of Finance, St. Frances Xavier Hospital, taken by deposition on October 15, 1992, reveals that the above payment was for temporary medical

services and contained the address of Western Medical Services, Department 05518, San Francisco, California 94139-5518; however, the check was not mailed (Deposition page 9). The check was endorsed "deposited only to 096-3147-403."

The testimony of Derwit Wyatt Nettles, Vice-President, The First Savings Bank formerly First Federal of South Carolina, taken by deposition on November 25, 1992, reveals that this check was deposited to the account of the Day Corporation, account number 963147403 (Deposition page 10; Exhibit 2 to Nettles Deposition). The deposit statement (Exhibit 1 to Nettles Deposition) confirms this fact.

Nettles also confirmed that the authorized signatory on the account of the Day Corporation was George L. Day. (Exhibit 23 to Nettles Deposition).

7) On or about June, 1990, Debtor misappropriated a check from Champus/Champva in the amount of $4,352.00 by diverting the check which was to be mailed to Plaintiff at its California address and placing it into the account of Gold I, Inc., d/b/a/ Western Temporary Services at Trust Company Bank in Savannah.

Exhibit P-3 is a check drawn by Champus/Champva, check number 901770169, dated June 1, 1990, in the amount of $4,352.00 payable to Western Medical Services deposited to the account of Gold I.

The testimony of Betty Force, Supervisor of Program Integrity, Champus, introduced by deposition, reveals that the payment was for medical services by a provider. The billing address was shown as Western Medical Services, Home Health Agency, Department Box

05518, San Francisco, California. (Deposition page 8). The check was not mailed to this address but was mailed to Western Medical Services, Home Health Agency, 4975 Lacross Road, Suite 311, North Charleston, South Carolina 29418-6525.[1] (Deposition page 9). The check was endorsed "For Deposit Only, Gold I, Inc., d/b/a Western Temporary Services. (Deposition page 4).

This account number 1500494800 (see back of check, Exhibit 1 to Force Deposition) is, in fact, the account of Gold I, Inc., at Trust Company Bank, Savannah, Georgia. The testimony of Ms. Miller of Trust Company was that this $4,352.00 check was deposited in the account of Gold I, Inc., at Trust Company Bank of Savannah on June 18, 1990, account number 1500494800. This information is consistent with the bank statement of June 30, 1990. Ms. Miller also testified that the Gold I, Inc., corporate authorization with the bank authorized either Debtor or Debbie Gaines, the wife of Debtor, to draw on the account. (Transcript p. 163).

8) On or about May 10, 1990, Debtor misappropriated a check from William H. Marsh, M.D., in the amount of $76.31 by diverting the check and placing it into the account of Gold I, Inc., d/b/a Western Temporary Service at Trust Company Bank in Savannah.

Exhibit P-4 is a check drawn by William H. Marsh, M.D., check number 1364 dated April 27, 1990, in the amount of $76.31 payable to Western Medical Services and deposited to the account of Gold I at Trust Company Bank, account number 1500494800.

The testimony of Dr. William H. Marsh was introduced by deposition and reveals that the above payment was made to Western Medical Nursing Services (Deposition page 5). The check was endorsed "Deposit to . . . 1500494800 . . . Gold One, Inc." (Deposition page 6). Dr.

[1] This was the address of Debtor's South Carolina business.

Marsh testified that the check indicates a deposit to Trust Company Bank. Dr. Marsh testified that his bank paid the check on May 11, 1990.

This account number 1500494800 is, in fact, the account of Gold I, Inc., at Trust Company Bank, Savannah, Georgia, and the Marsh facts were verified by Ms. Miller of Trust Company.

The testimony of Ms. Miller of Trust Company was that this $76.31 check was deposited in the account of Gold I, Inc., at Trust Company Bank of Savannah on May 10, 1990, account number 1500494800. This information is consistent with the Trust Company bank statement. *See* Transcript of January 19, 1993 hearing, page 161.

9) On or about April 9, 1990, Debtor misappropriated a check from Westside Urban Health Center, Inc., in the amount of $345.00 by diverting the check and placing it into the account of Gold I, Inc., d/b/a Western Temporary Services at Trust Company Bank of Savannah.

Exhibit P-5 is a check drawn by Westside Urban Health Center, Inc., check number 753 dated April 9, 1990, in the amount of $345.00 payable to Western Temporary Services deposited to account number 1500494800.

The testimony of Nancy Scott, Accounts Payable Clerk, Westside Urban Health Center, Savannah, Georgia, introduced by deposition, reveals that the above payment was made payable to Western Temporary Services, Department 05519, San Francisco, California 94139-5518 (Deposition page 7; Exhibit 1 to Deposition). The check was endorsed "Deposit to 1500494800.

This account number 1500494800 (see back of check, Exhibit 1 to Scott Deposition) is, in fact, the account of Gold I, Inc., at Trust Company Bank, Savannah, Georgia. This testimony was consistent with that of Ms. Miller of Trust Company. *See* Transcript page 163.

10) On or about October 5, 1990, Debtor misappropriated a check from Weyerhaeuser Paper Company in the amount of $363.09 by diverting the check and placing it into the account of Gold I, Inc., d/b/a Western Medical Services at First Union Bank in Charlotte, North Carolina.

Exhibit P-6 is a check drawn by Weyerhaeuser Paper Company, check number 1108026296 dated September 20, 1990, in the amount of $363.07 payable to Western Temporary deposited to the account of Gold I, account number 7049053444.

The testimony of Robin Abernathy, Controller, Weyerhaeuser Paper Company, introduced by deposition reveals that the above payment was for temporary services and made payable to Western Temporary, 4421 Stuart Andrew Boulevard, Charlotte, North Carolina 28217. The check was endorsed "deposit only to 7049053444."

The testimony of Robert W. Staff, Vice-President, First Union National Bank of North Carolina, introduced by deposition on November 24, 1992, reveals that this check was deposited on October 4, 1990, to the account of Gold, Incorporated, account number 7049053444 (Deposition pages 4 and 5) (Exhibit 17 to Staff Deposition). The deposit statement (Exhibit 17 to Staff Deposition) confirms this fact. (Deposition page 6).

Staff also confirmed that the authorized signatory on the account of Gold Incorporated was George L. Day. (Deposition pages 3 and 4; Exhibit 16 to Staff Deposition).

11) On or about December 6, 1989, Debtor misappropriated a check from GAB Business Services, Inc., in the amount of $598.22 by diverting the check and placing it into the account of GLD Enterprises, Inc., at South Carolina Federal in Charleston, South Carolina.

Exhibit P-7 is a check drawn by GAB Business Services, Inc., check #0243461 dated December 6, 1989, in the amount of $598.22 payable to Western Temp Services and deposited to the account of GLD Enterprises, account number 0160000135131;

The testimony of Lathan R. Luna, Assistant Vice-President and Records Custodian, South Carolina Federal, introduced by deposition, reveals that this check was deposited on January 11, 1990, to the account of GLD Enterprises, account number 160000135131 (Deposition pages 7 and 8). The account was opened by George Day. The deposit statement (Exhibit 1 to Luna Deposition) confirms this fact.

Luna also confirmed that the authorized signatory on the account of GLD Enterprises was George L. Day. (Exhibit 12 to Luna Deposition).

12) On or about May 29, 1990, Debtor misappropriated funds paid by Lula Mae Jones in the amount of $300.00 by diverting and retaining the funds at South Carolina Federal in North Charleston, South Carolina.

Exhibit P-8 is a receipt in the amount of $300.00 dated May 29, 1990, from Lois Germain to Western Medical Services, 4975 Lacross Road, Suite 107, North Charleston, South Carolina 29418, for nurses aid services on the matter of Lula Mae Jones. Plaintiff Western Temporary Services never received these funds.

13) On or about February 5, 1991, Debtor misappropriated funds in the amount of $45.18 paid by money order and drawn by Cleaner's Supply and payable to Western Temporary Services. When Plaintiff found out about this misappropriation and complained to the Debtor, the amount was paid to Plaintiff. *See* Exhibit P-9.

14) The franchise agreements with Plaintiff provide for attorney fees to the prevailing party in the event of legal action either in the main body of the agreement or in an addendum:

a. Exhibit P-28 - Franchise Agreement signed by Debtor and dated June 14, 1989 - paragraph 3(g); addendum June 14, 1988, at paragraph 5; addendum June 11, 1989, at paragraph 6;

b. Exhibit P-31 - Franchise Agreement signed by Debtor and dated May 22, 1989 - paragraph 3(g); addendum May 22, 1988, at paragraph 4; addendum June 15, 1989 at paragraph 6;

c. Exhibit P-33 - Franchise Agreement dated May 14, 1987 - paragraph 3(g); addendum May 21, 1987 at paragraph 6;

d. Exhibit P-34 - Franchise Agreement dated February 13, 1989 - paragraph 3(g); addendum February 13, 1989, at paragraph 4;

e. Exhibit P-35 - Franchise Agreement signed by Debtor and dated March 19, 1989 - paragraph 3(g); addendum September 7, 1990, at paragraph 6;

f. Exhibit P-37 - Franchise Agreement signed by Debtor and dated August 13, 1987 - paragraph 3(g);

g. Exhibit P-36 - Franchise Agreement signed by Debtor and dated May 21, 1987 - paragraph 3(g);

15) Debtor intended to take the above funds while knowing that he and his companies were prohibited from doing so. In fact, Debtor was unquestionably familiar with the fact that he had

an express responsibility to Plaintiff to have all customer payments remitted directly to Plaintiff. *See* Plaintiff's Exhibit 12. On another occasion in 1989, Debtor had diverted and misapplied funds and when confronted, he expressly agreed in writing on July 7, 1989, that "from this day forward I will be sure that no one from my staff or myself deposit any monies in our local bank account that belongs to Western." Debtor's September 19, 1989, letter to Plaintiff acknowledged that "[I] am the one who received the checks and deposited them into my account" and ". . . will never let that happen again." *See* Plaintiff's Exhibits 12 and 13.

16) Debtor has consistently refused, both during Rule 2004 discovery and at trial, to answer any questions involving the missing funds, electing to assert the Fifth Amendment privilege against self-incrimination. The only rebuttal put forth by Debtor to the evidence of Plaintiff was a suggestion that the misappropriated funds could have been the acts of others within his corporations. This suggestion is not credible enough to outweigh the evidence of Plaintiff for three reasons:

a. Debtor testified on cross examination that he had no reason whatsoever to suspect anyone in any of his corporations of misappropriation, and in fact in none of the corporations was there ever any more than one person who had authority with respect to the bank accounts.

b. Debtor drew his income checks from the very accounts into which the misappropriated funds were deposited.

c. In the Champus/Champva $4,352.00 and the Marsh $76.31 incidents of misappropriation, the payments were for the Charleston, South Carolina, bank account, yet these funds were deposited in the Trust Company Bank in Savannah, Georgia. This was the account used by the Debtor's Savannah business, Gold I, Inc. Debtor offered no excuse for his commingling of misappropriated funds. The only other authorized signatory on the Gold I, Inc., account was Debtor's wife, and she was not a signatory on the First Federal of South Carolina bank account.

17) Plaintiff, Western Temporary Services, Inc., filed a complaint to determine dischargeability of debt on July 2, 1991, against Debtor under 11 U.S.C. Section 523(a)(6) asserting that Debtor misappropriated funds in at least the amount of $17,812.29 and claims this amount, together with attorney's fees, should be found to be non-dischargeable debt obligations.

18) The unrefuted acts of Debtor constitute an intentional, fraudulent conversion of customer remittances and were in violation of the franchise agreement. These fraudulent conversions were purposefully committed by Defendant with the intent of depriving Plaintiff of funds which lawfully belonged to Plaintiff. Defendant knew that the actions he took in intentionally depriving Plaintiff of said fees were in express violation of the franchise agreement.

Facts regarding the Section 727 complaint:

19) On April 1, 1991, Defendant filed a petition with this court seeking relief under Chapter 7 of the Bankruptcy Code.

20) Debtor filed a sworn Statement of Affairs and Schedules in this case which carry the date of March 20, 1991, declaring under penalty of perjury that he had read the schedules and attachments and that they were true and correct to the best of his knowledge, information and belief.

21) Debtor failed to disclose that he was a party to a suit in the Court of Common Pleas for the County of Charleston, South Carolina, case number 91-CP-10-0803 by which he was enjoined by Temporary Injunction on February 26, 1991, from violating the terms of his franchise agreement. In fact, Debtor stated in response to 10(b) of the Statement of Financial Affairs that the "only" suit to which he was a party within the preceding one year was his "divorce."

22) Debtor failed to reveal his interest as lessee in a longterm lease of an office condominium at 7805 Waters Avenue, Suite 2-B, Savannah, Georgia, which he entered into with West Realty within one month of filing his bankruptcy petition. The lease was a personal obligation of Debtor and the obligation is not revealed anywhere in the schedules.

23) Debtor failed to reveal his interest as sub-lessor in two sub-leases of the office condominium at 7805 Waters Avenue, Suite 2-B, Savannah, Georgia, which he entered into with both his wife and John Saxon within one month of filing his bankruptcy petition. These leases inured to the benefit of Debtor personally to the extent of $600.00 per month and these assets are not revealed anywhere in the schedules. The Debtor's excuse for not revealing these assets was simply that he considered the lease obligation and subleases a wash to him and therefore not of any value.

24) Debtor failed to reveal that he had an interest in Lot 40, King's Grant Subdivision, at Georgetown in Chatham County (7 Barksdale Drive) at the time he filed his petition. Debtor purchased said property in the name of "Gold Rush A-Partnership" on April 24, 1990, and had lived in the property at the time of filing the petition to at least September, 1991, when a mortgageholder foreclosed. Though Debtor maintained that he had intended to purchase the property from the Internal Revenue Service as a partnership, he also believed that his "partner" had not completed the paperwork. *See* page 1 of Debtor's Statement of Financial Affairs which reveals a possible interest in a partnership called "Gold Rush" but claims the partnership was not finalized.

25) Debtor's schedules represented that he had zero income and zero expenses at the time of filing.

26) Debtor did not reveal the existence of his ownership interest in The Day Company or Corporation or its assets in First Federal of South Carolina in his schedules. However, Debtor claimed at the hearing that the "Day Corporation" was never a real corporation, and the current status of the Day Company or Corporation was never made clear to the court. *See* Transcript pages 69-71. The evidence at the hearing did not clearly establish that Debtor omitted assets regarding the Day Company or Corporation. Debtor did reveal that he had an ownership interest in GLD Enterprises, Inc., Geld, Inc., Dayhill, Inc., and Gold I, Inc.

27) Debtor maintained the following corporate relationships:

a. GLD Enterprises, Inc. - Debtor owed 100% of the stock.

b. Geld, Inc. - Debtor states in his schedules he owned 100% of the stock, but Exhibit P-20 reveals he owned 60% of the stock.

c. Dayhill, Inc. - Debtor owned 60% of the stock and Christine Y. Hill owned 40%.

d. Gold I, Inc. - Debtor owned 60% of the stock and his wife, Debbie Gaines Day, owned 40%.

e. Charleston Temporary Services, Inc. - Debtor owned 100% of the stock.

28) The evidence showed that Debtor maintained a corporate checking account for The Day Corporation. *See* Transcript pages 70 and 71. *See also* Exhibit PA-3.

CONCLUSIONS OF LAW

The issue presented with respect to Section 523(a)(6) is whether the Debtor will

be held personally liable for the misappropriation or conversion of Plaintiff's funds together with attorney's fees. Plaintiff seeks to have a judgment for the misappropriated or converted funds in the amount of $17,767.11.[2] Section 523(a)(6) provides in relevant part:

> (a) A discharge . . . does not discharge an individual debtor from any debt--
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

The dominant purpose of the bankruptcy laws is to provide the debtor with comprehensive, needed relief from his financial burden by releasing him from his dischargeable debts. The burden of proof lies with the creditor to show that the particular debt falls within one of the statutory exceptions. When a creditor seeks to have a debt determined to be non-dischargeable, the creditor bears the burden of proving each element of the applicable code section by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Thus, in order to except a debt from discharge under Section 523(a)(6), the creditor must prove three elements by a preponderance of the evidence:

> 1) That the Debtor injured another entity or the property of another entity;
>
> 2) That the Debtor's actions were deliberate and intentional; and
>
> 3) That the Debtor's actions were malicious.

The Eleventh Circuit in Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257 (11th Cir.

[2] Plaintiff sought $17,812.29 in the complaint, but Saundra Fridley testified that Debtor had paid the $45.18 which had been misappropriated on the Cleaners Supply when Plaintiff complained upon learning from the customer that it had already paid Debtor's company; therefore, the claim is actually $17,767.11 which is the total of the other eight checks and/or receipt.

1988), approved and adopted the approach set forth in United Bank of Southgate v. Nelson, 35 B.R. 766 (N.D. Ill. 1983), in construing the "willful and malicious" elements of 11 U.S.C. Section 523(a)(6). Under Southgate, "willful means deliberate or intentional" and "malice for purposes of section 523(a)(6) can be established by a finding of implied or constructive malice." Rebhan, 842 F.2d 1263. "No showing of personal hatred, spite or ill-will is required to prove an injury malicious; it is enough that it was 'wrongful and without just cause or excuse'." In re Lindberg, 49 B.R. 228, 230 (Bankr. D. Mass. 1985) (quoting In re Askew, 22 B.R. 641, 643 (Bankr. M.D.Ga. 1982), aff'd, 705 F.2d 469 (11th Cir. 1983). Hence, an injury is considered "willful" if it is intentional and "malicious" if it results from an intentional or conscious disregard for one's duties. Id.

The conversion of another's property is a willful and malicious injury within the meaning of the Section 523(a)(6) exception. Great Southern Federal Savings Bank v. John Alfred Harmon, Adversary Proceeding No. 89-4036 (Bankr. S.D.Ga. 1989); Matter of McLaughlin, 14 B.R. 773, 775 (Bankr. N.D.Ga. 1981); 3 Collier §523.16 at p.523-116 (15th Ed. 1989).

In assessing the intent of the Debtor, a business person will be held to a higher standard than an ordinary individual where it is clear that the business person would be more knowledgeable of the natural consequences of his acts. Matter of Ricketts, 16 B.R. 833, 834-35 (Bankr. N.D.Ga. 1982); Great Southern, supra at 11-12.

The Debtor in the present case was no novice to the business world or of the requirements placed on him by the franchise agreements with Plaintiff. He knew beyond all doubt that he was not to deposit or allow the deposit of customer payments into his business accounts. On another occasion in 1989, Debtor had diverted and misapplied funds of Plaintiff and when confronted he expressly agreed in writing on July 7, 1989, that "from this day forward I will be sure

that no one from my staff or myself deposit any monies in our local bank account that belongs to Western." Debtor's September 19, 1989, letter to Plaintiff acknowledged that "[I] am the one who received the checks and deposited them into my account" and " . . . will never let that happen again."

The evidence tendered by Plaintiff through Ms. Fridley and the payors of the funds and the bank officials is convincing and satisfied the burden of Plaintiff that Debtor knew about the conversions, had control of the accounts into which the funds were diverted and above all knew beyond a shadow of a doubt that this conduct was expressly prohibited. Ms. Fridley testified that Western Temporary would have terminated the Debtor's franchise(s) agreements in 1989 but for his express promises to repay and not to divert any more funds.

The conversion by Debtor was certainly out of the ordinary course of business and Debtor's only defense was to suggest that someone else might be responsible. However, on cross examination, Debtor admitted (only after being presented with the document) signing and sending written instructions to his South Carolina office directing that all checks be sent directly to him (Plaintiff's Exhibit 16).

Debtor cannot escape responsibility by hiding under a corporate shield maintaining that the diverted funds were deposited in corporate accounts. It is well established that officers and directors of a corporation will be held liable for debts that may also be debts of a corporation where their participation in the commission of tortious acts results in some harm to a third party and causes them to be liable to that party. Ford Motor Credit Co. v. Owens, 807 F.2d 1556, 1559 (11th Cir. 1987) (per curiam). The officer or director is liable as an actor, not an owner. Matter of Hyers, 70 B.R. 764 (Bankr. M.D.Fla. 1987).

Rather than elect to come forward with affirmative evidence, if any exists, to rebut the convincing evidence adduced by Plaintiff, Debtor exercised his constitutional right conferred by the Fifth Amendment to refuse to answer any questions about the misappropriation; however, this election is not a substitute for evidence. The United States Supreme Court has concluded that a view to the contrary would "convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would have otherwise been his." United States v. Rylander, 460 U.S. 752, 75 L.Ed. 2d 521, 103 S.Ct. 1548, 75 L.Ed.2d 1342 (1983); accord, United States v. Baker, 721 F.2d 647 (8th Cir. 1983).

Debtor willfully and maliciously converted property of Plaintiff in the amount of $17,767.11 to its injury and this debt is non-dischargeable under Section 523(a)(6) of the Bankruptcy Code. Debtor attempted to maintain that he was entitled to a credit against the amount of Plaintiff's claim due to a possible reserve held by Plaintiff but the Court does not accept this assertion[3] for, if Debtor were actually entitled to a credit, such would constitute an asset in his bankruptcy case which is no where revealed in his schedules. The fact is that such a credit, if it exists, must inure to the benefit of the corporate franchisees and any credits will be a matter between Plaintiff and the corporate franchisees.

The question remains whether Plaintiff is entitled to recover attorney fees as part of its non-dischargeable debt. Attorney fees are properly awarded to a creditor prevailing in a

[3] Debtor attempted to assert a defense to the claim of Plaintiff that Plaintiff owed Debtor on a bad debt reserve. The court sustained an objection to the admissibility of this evidence because this effort was merely an attempt to interpose a "defense" of recoupment or set-off. This position incorrectly assumes that recoupment and set-off are defenses, which they are not. Recoupment and set-off are counterclaims and not defenses and must be set forth in the original pleadings as compulsory counterclaims. Swim Dixie Pool Corp. v. Kraemer, 157 Ga. App. 748, 278 S.E.2d 448 (1981). There were no counterclaims filed in this case and there are no counterclaims pending.

bankruptcy claim if there exists a statute or valid contract providing therefore. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967); Transouth Financial Corporation of Florida v. Johnson, 931 F.2d 1505 (11th Cir. 1991). The Bankruptcy Code attempts to discourage abuse and "[f]raudulent conduct is best discouraged, not only by denying discharge, but also by . . . [recognizing that] the creditor who has been defrauded is entitled to all of its rights under the contract, including reasonable attorney fees." Transouth, Id. at 1508-09 (quoting Chase Manhattan Bank v. Birkland, 98 B.R. 35, 37 (Bankr. W.D. Wash. 1988)). The franchise agreements provided for attorney fees to a prevailing party in either the body of the initial agreements or in the addendum to the initial agreements. In each case it was the Debtor who executed the documents. Debtor was well aware that Plaintiff would be entitled to attorney fees in the event he caused a breach and he caused the breach. Debtor's conduct also constituted a tortious injury to the Plaintiff independent of the clear branch of contract brought about by his actions and as such further justify the award of attorney fees. Harrell v. Gomez, , 174 Ga. App. 8, 329 S.E.2d 302 (1985).

By stipulation the affidavit of C. James McCallar, Jr., was introduced with respect to attorney's fees. In reviewing the time and charges, it is evident that the vast majority of time and expense invested was involved in attempting to obtain information from Debtor through Rule 2004 and in securing depositions from out-of-state witnesses. There has been no evidence from opposing counsel that the fees and expenses sought are either unreasonable or unwarranted. The hourly rate of $125.00 has long been an approved rate by this court and 115.15 hours from July 2, 1991, through January 19, 1993, is not excessive when seven out-of-state depositions are required. Likewise, this court finds nothing unreasonable or excessive with the expenses which were detailed.

Accordingly, Plaintiff is entitled to judgment against Debtor in the amount of

$17,767.11 together with $18,077.98 for a total of $35,845.09 plus interest. This judgment shall be nondischargeable.

Plaintiff also argues in support of its general objection to discharge pursuant to Sections 727(a)(3), (a)(4)(A) and (a)(6)(c) of the Bankruptcy Code. Plaintiff's primary objection is based on Section 727(a)(4)(A) which provides that a discharge may be denied where:

> [T]he debtor knowingly and fraudulently, in or in connection with the case--
>
> (A) made a false oath or account . . .

11 U.S.C. §727(a)(4)(A). A creditor objecting to discharge under Section 727(a)(4)(A) must prove that the false oath was made knowingly and fraudulently about a material matter. Swicegood v. Ginn, 924 F.2d 230 (11th Cir. 1991); In re Raiford, 695 F.2d 521, 522 (11th Cir. 1983). *See also* Chalik v. Moorefield, 748 F.2d 616 (11th Cir. 1984). According to the Eleventh Circuit in Chalik:

> The subject matter of a false oath is 'material' and sufficient to bar discharge if it bears a relationship to the bankrupt's business transaction or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.

748 F.2d at 618. A discharge should not be denied where only a simple mistake or inadvertence created the false statements. In re Gonday, 27 B.R. 428, 433 (Bankr. M.D.La. 1983). 4 Collier on Bankruptcy §727.04 at 727-61 (15th Ed. 1992). However, fraudulent intent may be inferred from all the facts and circumstances of a case. In re Nazarian, 18 B.R. 143, 146 (Bankr. D.Md. 1982). *See also* Future Time, Inc. v. Vates, 26 B.R. 1006, 1007 (M.D.Ga. 1983).

Plaintiff has alleged several assets were omitted from Debtor's petition. First, Debtor failed to list a commercial lease on his petition, which obligated Debtor to pay $600.00 per month in lease payments. However, Debtor subleased the property pursuant to two separate subleases, which provided Debtor with the $600.00 lease payment. As the transaction was a "wash" as claimed by Debtor I cannot conclude that the omission was fraudulent and material. Debtor should have listed the original lease and the subleases in his petition; however, the failure to do so appears to be due to mistake and inadvertence.

Plaintiff also alleges that Debtor failed to reveal an interest in certain property on Barksdale Drive in Chatham County. Debtor lived in this property for a short period of time before foreclosure. Although Debtor did not list the house in his schedules, Debtor did reveal a possible interest in the partnership on page one of his statement of financial affairs. The house was purchased at a tax sale in the name of a partnership "Goldrush." Debtor's partner, however, contributed all the funds for the purchase from the Internal Revenue Service. Since Debtor failed to contribute his share of the proceeds the partnership was never consummated. Because it was not, and because Debtor contributed none of the funds with which the IRS was paid, and fully revealed the facts to his counsel, I conclude that no material omission occurred. Neither Debtor nor the partnership were able to arrange to resume the mortgage on this property which was ultimately foreclosed by the lender. Based on all the facts, while counsel's method of disclosure was not perfect, it is sufficient under these facts to negate the element of "intent to defraud."

I conclude that Plaintiff has not met its burden of proof for denying Debtor a discharge under 11 U.S.C. Section 727(a)(4)(A), 727(a)(3) and 727(a)(6)(c). Therefore, Plaintiff's objections to Debtor's discharge are overruled.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY THE ORDER OF THIS COURT that Plaintiff is entitled to judgment against Debtor in the amount of $17,767.11 together with $18,077.98 in attorney's fees for a total of $35,045.09 plus interest, and this judgment shall be nondischargeable. Plaintiff's objections to Debtor's discharge based on Section 727 are overruled.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of March, 1993.